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No. 90-581

Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1990

FRANCIS J. THOMPSON, et al.,

Petitioners,

vs.

BRITISH AIRWAYS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under the Warsaw Convention Treaty, a rerouted segment of travel within a round-trip journey due to involuntary rerouting of the passenger by the air carrier, was a leg or segment of a "single operation" i.e., "undivided (round-trip) transportation", where the passenger had contracted for and did make a round-trip journey and where the passenger was involuntarily rerouted by the first carrier on the journey to another carrier who at no additional cost to the passenger accepted and transported the rerouted passenger on a leg of the round-trip journey.
2. Under the Warsaw Convention Treaty, whether the place of destination of a round-trip journey is the place where the journey originated and whether a journey retains it intended round-trip character,

where the passenger had contracted for and did make a round-trip journey and where the passenger was involuntarily rerouted by the first carrier on the journey to another carrier who at no additional cost to the passenger accepted and transported the rerouted passenger on a leg of the round-trip journey.

3. Under the Warsaw Convention Treaty, whether a carrier is a successive carrier over whom treaty jurisdiction exists at the place of destination of a round-trip journey, where the passenger had contracted for and did make a round-trip journey and where the passenger was involuntarily rerouted by the first carrier on the journey to another carrier who at no additional cost to the passenger accepted and transported the rerouted passenger on a leg of the round-trip journey.

4. In actions governed by the Warsaw Convention Treaty, may the airline assert the baggage damages limitation provisions of the Treaty, where it failed to satisfy the baggage check requirement under Article 4 of the Treaty?

5. Whether a tariff filed by the carrier which barred recovery of consequential damages is inconsistent with the liability and recovery of damages provisions of the Warsaw Convention Treaty and is invalid and could not be enforced, where such tariff barred recovery of consequential or special damages as a part of compensatory damages arising from carriage governed by the Treaty.

6. Whether the Court of Appeals erroneously concluded that genuine issues of material facts necessary to be litigated, do not exist as to petitioners discrimination claims.

7. Whether the Court of Appeals erroneously concluded that genuine issues of material facts necessary to be litigated, do not exist as to wilful misconduct by the respondents.

8. In actions governed by the Warsaw Convention Treaty, may punitive damages allowed under local law be recovered, where a carrier is liable for wilful misconduct or otherwise not entitled to assert the Treaty's liability limitation?

9. Whether the Court of Appeals erroneously concluded that there was no abuse of discretion in the District Court's mootness dismissal of petitioners pending motions to amend complaint, for discovery, and for F.R.C.P. 11 and 28 U.S.C. 1927 sanctions and damages.

LIST OF PARTIES TO THE PROCEEDING1/

1/ The parties to this proceeding are as follows: The plaintiffs are Francis J. Thompson, Eleanor J. Thompson, Francis C. Thompson, a minor, and Eleanor D. Thompson, a minor. The defendants are Trans World Airlines, Inc. ("TWA") and UTA French Airlines ("UTA"). The plaintiffs and defendants in In Re Korean Air Lines Disaster of September 1, 1983, MDL-565 (D.D.C. 1989) participated in the proceeding in amicus curiae status.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Francis J. Thompson, Pro Se, Eleanor J. Thompson, Pro Se and minors Francis C. Thompson and Eleanor D. Thompson by and through Francis J. Thompson, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this

matter on April 20, 1990, which remanded in part and affirmed in part the order and judgment of the United States District Court for the District of Columbia entered on April 18, 1989.

OPINIONS BELOW

The unpublished written Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit appears in Appendix A to this Petition. The Memorandum and Order of the United States District Court for the District of Columbia is reported as Thompson v. British Airways, 21 Avi. 18,290 (D.D.C. 1989), and appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals' Judgment and Opinion in this matter was entered on April 20, 1990. A timely Petition for Rehearing was filed on May 21, 1990. The Court of

Appeals' denial of the Petition for Rehearing was issued on June 29, 1990 and is set forth in Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

PROVISIONS OF LAW INVOLVED

This case involves the Warsaw Convention Treaty2/, (hereinafter, "Warsaw Convention", "Convention", "Treaty"), the Montreal Agreement3/, International Passenger Rules Tariff No. IPR-2, C.A.B. No. 376, (hereinafter, "IPR-2", "Tariff"), (part of which appears in the record at R-79, Ex. 6). Federal Aviation Act of 1958, 404(b), as amended, 49 U.S.C. 1374(b) (404(b)),

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2/ A Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in 49 U.S.C. 1502 note.

3/ Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900, Approved by Executive Order E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966), reprinted in Civil Aeronautics Board, Aeronautical Statutes and Related Material 515-16 (1974).

49 U.S.C. App. 1551(a)(2)(B) and 1551(a)(4)(C), 49 U.S.C. 1301, Supplement to Local Rules of the U.S. District Court for the District of Columbia, as amended, (1986 edition), page 51-A, 28 U.S.C. 1927, Fed. R. Civ. P. 11, 15(a), 33 and 37. Their pertinent provisions are set forth in Appendices D to J, respectively.

BASIS OF FEDERAL JURISDICTION

The United States District Court for the District of Columbia had jurisdiction pursuant to Title 28 U.S.C. 1331 by virtue of the Warsaw Convention Treaty. The United States Court of Appeals for the District of Columbia Circuit had jurisdiction by virtue of 28 U.S.C. 1291.

STATEMENT OF THE CASE

A. Proceedings Below

On December 11, 1987, the petitioners filed a complaint in the United States District Court for the District of Columbia alleging wilful misconduct, breach of contract, negligence and discrimination by

the respondents, for which compensatory (including consequential and special damages) and punitive damages were sought.

The District Court, in a Memorandum and Order entered on April 18, 1989, granted summary judgment in favor of UTA and TWA on grounds that petitioners had failed to satisfy the jurisdictional amount of $10,000.00 pursuant to 28 U.S.C. 1332 and 28 U.S.C. 1337. App. B, infra, p.B-13.

In its Summary Judgment Memorandum of April 18, 1989, the District Court concluded that "plaintiffs have not alleged facts that constitute wilful misconduct." App. B, infra, p. B-8, hence, "the claim is controlled by the liability limitation of the Warsaw Convention." App. B, infra, p. B-14.

The petitioners' claims against UTA and TWA for discrimination and punitive damages were stricken by the District Court's April 18, 1989 Order, in which the court denied as

moot, the petitioners pending motions. The petitioners' pending motions affected by the court's order included the following:

1. Plaintiffs' Motion for Order Compelling Answers to Interrogatories and Compelling Response to Production of Documents.
2. Plaintiffs' Motion to compel More Complete Response by Defendant UTA French Airlines to Request for Production of Documents and for Sanctions.
3. Plaintiffs' Motion for Order to Strike and Expunge Defendant UTA's Interrogatory Number 16 and for Rule 11 and 28 U.S.C. 1927 Sanctions and Damages.
4. Plaintiffs' Motion for Enlargement of Time to Respond to UTA's Motion for Order Compelling a More Complete Answer to Interrogatory Number 16.

5. Plaintiffs' Motion for Reconsideration of Order [R116] Denying Plaintiffs' Motion for Order to Strike and Expunge Defendant UTA's Interrogatory Number 16 and for Damages and Sanctions under Fed. R. Civ. P. 11 and 28 U.S.C. 1927.

6. Plaintiffs' Motion for Order Compelling More Complete Response by Defendant TWA to Request for Production of Documents and for Sanctions.

7. Plaintiffs' Motion for Leave to Amend Complaint.

Petitioners appealed, and the United States Court of Appeals for the District of Columbia Circuit remanded the case in part and affirmed in part. App. A, infra, p. A-2. In its Opinion filed on April 29, 1990, the D.C. Circuit Court of Appeals concluded that the UTA leg of petitioner's journey was not part of a "single operation of undivided

(round-trip) transportation" and thus "destination" of their journey was "Sierra Leone, not Washington, D.C.," hence treaty jurisdiction as to UTA did not exist in the United States of America. Id.

The Court of Appeals' April 29, 1990 Judgment remanded the Petitioners' negligence and breach of contract claims against TWA and, primarily focusing on TWA only, affirmed the dismissal of the petitioners' discrimination and punitive damages claims.

The Court of Appeals also affirmed the District Court's mootness disposition of the petitioners' pending motions to amend their complaint [R-124], to compel discovery [R-48, R-71, R-105, R-123], and for FRCP 11 and 28 U.S.C. 1927 sanctions and damages for the blatant and vexatious violations by respondent UTA and its attorneys, of the protective order and related rules of the District Court. [R-106, R-121].

On May 21, 1990, the Petitioners

petitioned the D.C. Circuit for a rehearing, which petition was denied on June 29, 1990.

Statement of Facts

Petitioners are domiciliaries of the United States of America who were air passengers on a round-trip journey to Sierra Leone which commenced in Washington, D.C. on December 11, 1985. The tickets for the journey by business class were purchased and issued in the District of Columbia in two booklets, one for travel from Washington National Airport to Freetown, Sierra Leone and the other for the return journey to Washington, D.C.

Trans World Airlines (TWA), the first carrier on petitioners' round-trip journey, subjected them and their baggage to delays at Washington National Airport which resulted in late arrival and missed connection for petitioners at New York's Kennedy Airport (JFK).

At Washington National Airport, petitioners paid TWA the sum of $1,205.00 assessed by the carrier as excess baggage charges. TWA assured them that their baggage would accompany them on all of their flights on the journey. Despite TWA's assurances in this regard, petitioners arrived in Freetown unaccompanied by their baggage. Almost a week after petitioners arrived in Freetown, UTA delivered the baggage to them in badly damaged condition and lots of items missing.

At JFK, TWA had possession of petitioners' tickets for several hours and failed to promptly arrange alternative travel for the petitioners' onward journey to Sierra Leone, compelling them to remain in New York for more than 24 hours. In New York, TWA rerouted petitioners to London on their onward journey to Freetown, Sierra Leone. The TWA flight from New York was delayed and arrived in London much later than scheduled. TWA in London intentionally and adamantly

refused to have petitioners transferred from Heathrow to Gatwick Airports for their connecting flight to Sierra Leone.

The late arrival in London of the TWA flight, compounded by TWA's refusal and failure to promptly transfer petitioners from Heathrow to Gatwick Airports resulted in another missed connection for the petitioners. As in New York, TWA at Heathrow Airport had possession of petitioners' tickets for several hours and failed to promptly arrange alternative travel for their onward journey to Sierra Leone, compelling them to remain in London for more than 24 hours.

In London, TWA subjected the petitioners to harsh disparaging and discriminatory treatment and remarks, and rerouted them by British Airways to Paris for a UTA flight on their onward journey to Freetown, Sierra Leone. Without the petitioners' knowledge and consent, TWA downgraded from business to

economy the outstanding portion of their tickets for the Washington, D.C., U.S.A. to Freetown, Sierra Leone leg of their round-trip journey, and issued them with a Flight Interruption Manifest. TWA did not alter or reissue or replace the ticket for the petitioners' Freetown to Washington, D.C. return journey.

TWA also dispatched the petitioners to Paris from London prematurely on a day when the UTA flight was not scheduled, after assuring them that their connecting Paris to Freetown UTA flight was available and would afford them immediate connection upon their arrival in Paris. Petitioners were thus subjected by TWA to further delays and inconvenience, compelling them to remain in Paris, France for more than 24 hours, and confined for several hours at Charles de Gaulle Airport while TWA attempted to remedy the situation, as well as obtain visas authorizing the petitioners to proceed beyond

the Airport premises to a hotel.

Petitioners became aware of TWA's unauthorized downgrading of their travel when they were checked in by British Airways (BA) at Heathrow Airport for their onward journey to Paris. Upon petitioners' insistence, BA consulted by telephone with TWA on the matter and then accepted and transported them in business class from London to Paris.

Soon after petitioners arrived at Charles de Gaulle Airport in Paris, they notified TWA about the unavailability, for more than 24 hours, of the connecting UTA flight. They also called TWA's attention to its unauthorized downgrading of petitioners' travel and insisted that TWA ensure that performance of the remaining leg of their journey from Paris to Freetown on UTA be on business class. TWA later assured petitioners that it had ensured the reinstatement of their business class travel and had received UTA's assurances to

transport them in business class from Paris to Freetown.

Petitioners were checked in by UTA in Paris for economy instead of business class travel. They informed UTA that their transportation called for performance on business class, and requested that UTA verify that with TWA immediately in order to rectify the unauthorized downgrading of petitioners' travel on the UTA flight. UTA adamantly refused and failed to do so, even though there was considerable amount of time available to do so (close to one hour) between boarding of the plane and its departure. Instead, UTA agents subjected the petitioners to harsh treatment, threats as well as disdainful, disparaging and discriminatory remarks and treatment.

In the UTA aircraft, petitioners occupied seats in the business class section which had only a few passengers during the flight from Paris to Freetown. Throughout the

petitioners' eight and one-half hour flight, UTA served them no food or beverage, nor provided them with any of the other entitled amenities as air passengers in general, and business class passengers in particular.

As a result of the delays to which the petitioners were subjected on their journey, they lost the opportunity to purchase real estate (landed property) in Sierra Leone, and also incurred additional expenses en route. Petitioners also suffered personal injuries in form of emotional distress as a direct and proximate result of the respondents' conduct.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON THE PROPER INTERPRETATION OF CERTAIN KEY JURISDICTIONAL AND LIABILITY PROVISIONS OF THE WARSAW CONVENTION AND THE MONTREAL AGREEMENT AND THE FEDERAL AVIATION ACT OF 1958

A. The need for certiorari is significant, crucial and substantial and was implicitly expressed by the D.C. Circuit

The issue of Treaty Jurisdiction over a successive carrier under the Warsaw Convention based upon the place of destination in a round-trip journey situation, which is one of the primary issues presented in this petition, is an important treaty law question that very often presents the courts with a difficult jurisdictional problem, and is no exception in the instant matter. The D.C. Circuit highlighted its apparent discomfort and difficulty with the issue by its candid acknowledgement that "[t]he question of treaty jurisdiction over UTA however, is more problematic." App. A, infra, p. A-3. This may have been implicitly expressing the need for Supreme Court review of the question.

D. Thompson v. British Airways is contrary to the Warsaw Convention and numerous appellate decisions

The Opinion of the D.C. Circuit, which failed to recognize Washington, D.C. as the ultimate destination of petitioners' round-trip journey involving successive carriers, conflicts with the conclusion on the same or similar issue in a long line of cases by various United States Appellate Courts and State Courts of last resort, among others.

The cases and the commentators are almost unanimous in concluding that a journey has but one destination for purposes of jurisdiction under the Convention, and that in cases of round-trip carriage involving successive carriers, the place where the journey originated is the ultimate destination and that is the "destination" of the journey. Seth v. BOAC, 216 F.Supp. 244 (D.C. Mass. 1963), aff'd 329 F.2d 302 (1st Cir. 1964), cert denied, 85 S. Ct. 114 (1964).

In Re Alleged Food Poisoning Incident, March, 1984, 770 F.2d 3, 7 (2d Cir. 1985); Steber v. British Caledonian Airways, Ltd., 22 Avi. 17,211, 17214 (Ala., Ct. of Civ. Appeals, 1989); Adesina v. Swissair, 21 Avi. 17,469, 17,470 (New York Supreme Ct., 1988); Lee v. China Airlines, Ltd., 669 F. Supp. 979 (C.D.Cal. 1987), 21 Avi. 17,129, 17,131 (C.D.Cal. 1987); Petrire v. Spantex, S.A., 756 F.2d 263, 266 (2d Cir. 1985); In Re Air Crash Disaster at Malaga, Spain on September 13, 1982, 577 F. Supp. 1013, 1014-1015 (E.D.N.Y. 1984); Pimentel v. Bland, 748 F.2d 94, 96-97 (2d Cir. 1984); Gayda v. LOT Polish Airlines, 702 F.2d 424, 425 (2d Cir. 1983); Bornstein v. Scandinavian Airlines System, 16 Avi. 17,741, 17,742 footnote 1 (S.D.N.Y. 1981); Rinck v. Deutsche Lufthansa A.G., 395 N.Y.S.2d 7, 8-9 (N.Y. Supreme Ct., 1977); Butz v. British Airways t/a BOAC, 421 F. Supp. 127, 130 (E.D.Pa. 1976) aff'd, 566 F.2d

1168 (3rd Cir. 1977); Vergara v. Aeroflot Soviet Airlines, 390 F. Supp. 1266, 1269 (D.Neb. 1975); accord, Parkinson v. Canadian Pacific Airlines, 10 Avi. 17,967 (S.D.N.Y. 1968); Burdell v. Canadian Pacific Airways, Ltd., 17 Avi. 17,356 (Ill. Cir. Ct. 1969); Bowen v. Port of New York Authority, 8 Avi. 18,043 (N.Y. Supreme Ct. Queens Cty. 1964); Felsenfeld v. Societe Anonyme Belge D'Exploitation De La Navigation Aerienne, 234 N.Y.S.2d 351 (N.Y. City Civil Ct. 1962); Cf. 1 L. Kreindler, Aviation Accident Law Sect. 11.05 n. 25; Lowenfeld & Mendelsohn, "The United States and the Warsaw Convention" 80 Harv.L.Rev. 497, 528 (1967); Note, "Article 28 of the Warsaw Convention: A Suggested Analysis," 50 Minn.L.Rev. 697, 702 (1966).

In Re Alleged Food Poisoning Incident, March, 1984, 770 F.2d 3 (2d Cir. 1985) upon which the Court of Appeals

erroneously relied, stands for the proposition that the destination of a round-trip journey is the "end of the operation" of transportation and where successive carriers become involved, whether "under the form of a single contract or of a series of contracts" (Art. 1(3)), the destination is the end of the entire operation as agreed upon and not the place where a leg or segment of the journey ends. The plaintiff in In Re Alleged Food Poisoning Incident, supra, who had a Riyadh-Dhahran-London-Washington-New York round-trip ticket, argued that the destination where successive carriers are concerned is determined by the contract of each successive carriers. The court disagreed and held that where the parties' contract of transportation contemplated a single operation, the "destination" is the ultimate destination, and in the case of a round-trip journey, is the place where the

journey originated, Riyadh. Thus, under Article 28, the destination was Saudi Arabia, not the United States of America. Accord: Petrire v. Spantax, 756 F.2d 263 (2d Cir. 1985).

The rationale underlying the holding in In Re Alleged Food Poisoning Incident, supra, clearly supports the petitioners' argument that even "under the form of . . . a series of contracts" (Art. 1(3)), where successive carriers accepted and transported the petitioners on a leg of their round-trip journey at no additional cost to them beyond that called for in their round-trip contract of transportation, the contemplated ultimate destination of their journey is Washington, D.C., U.S.A., the place where the round-trip journey originated - not Freetown, Sierra Leone as concluded by the Thompson Court. [App. A, infra, p. A-4].

Similarly, under the same rationale, Freetown, Sierra Leone is the place where a

leg of the petitioners journey ends - not the ultimate destination of their journey. Freetown, Sierra Leone "was merely a stopping point before (petitioners') clearly-intended return to the United States." In Re Air Crash Disaster at Malaga, Spain, 577 F. Supp. at 1015. Thus, under Article 28 of the Convention, Washington, D.C., U.S.A. was the place of petitioners destination. Accordingly, Treaty jurisdiction over UTA, a successive carrier of the petitioners on their round-trip journey, exists in the United States of America where the journey originated and terminated.

The Court of Appeals' opinion not only conflicts with the above pre-existing majority decisions and the authorities, but also alters the Treaty's terms, and therefore cannot be reconciled with the United States Supreme Court's foreclosure in Chan v. Korean Airlines, Ltd., 109 U.S. 1676, 104 L.Ed.2d 113 (1989) of analytical reasoning

which strips the language of its plain meaning and effect and results in judicial alteration of the Convention's plain language.

In persuasive language, this Court has admonished:

> We must thus be governed by the text solemnly adopted by the governments of many separate nations - whatever conclusions might be drawn from the intricate drafting history that petitioners and the Solicitor General have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous. see, e.g., Air France v. Saks, 470 U.S. 392, 105 S. Ct. 1388, 84 L.Ed.2d 289 (1985). But where the text is clear, as it is here, we have no power to insert an amendment. (footnote omitted) Id. at 1683-84.

The Court of Appeals appears to have merely restricted its analytical focus on Article 28(1), and overlooked or misapprehended the language of Articles 1(3) and 30(1) which "indeed apply to the Article 28(1) jurisdictional, as well as other, Convention provisions," In re Alleged Food Poisoning Incident, 770 F.2d at

7. The language of these Articles, 1(3), 28(1) and 30(1), must be read in conjunction in order to determine the question of treaty jurisdiction over a successive carrier, based upon place of destination. Id.; also Petrire, 756 F.2d at 266; Steber, 22 Avi. at 17,213-14. Such a conjunctive reading of Article 28(1) and 30 was, to a limited extent, engaged by the D.C. Circuit when it addressed the question of treaty jurisdiction in Kapar v. Kuwait Airways Corp., 845 F.2d 1100, 1103 (D.C. Cir. 1988), a case with facts dissimilar and clearly distinguishable from Thompson. The Kapar Court's analysis had focused on treaty jurisdiction from the perspective of the carrier's domicile or principal place of business as well as the country where the carrier has a place of business through which the contract of carriage was made - not on the place of destination, especially in a successive

carrier round-trip situation. The Court of Appeals' secondary reliance on Kapar, therefore, is not only misplaced, but erroneously and impermissibly establishes that a round-trip carriage can have two destinations for purpose of treaty jurisdiction under the Convention.

Significantly, the airlines' own tariff provision, which reflects the respondents' understanding of the relevant Warsaw Treaty provisions, appears to be consistent with, and lends indisputable support to the petitioners' contention herein. Rule 55(A) of IPR-2, App. F, p. F-2 to which the respondents subscribe, App. F, p. F-1, provides as follows:

> A SUCCESSIVE CARRIERS
> Carriage to be performed under one ticket or under a ticket and any conjunction ticket issued in connection therewith by several successive carriers is regarded as a single operation.

This leads to a related derivative issue, not yet addressed by the courts, whether the

Flight Interruption Manifest ("FIM") issued by TWA, the petitioners' first carrier, and accepted by respondent UTA as petitioners' successive carrier, qualifies as the passenger ticket required under Article 3, App. D, pp. D-3, D-4, especially where it did not contain all of the particulars required.

A determination by the Court that the FIM satisfies the Article 3 passenger ticket requirement, makes the FIM at best a "conjunction ticket" for the London-Paris and Paris-Freetown legs in connection with performance under the petitioners' contract of transportation for their round-trip journey, hence "a single operation". IPR-2, Rule 55(A) at App. F, p. F-2. On the other hand, "the existence or the validity of the contract of transportation" Article 3(2) would be unaffected by a determination that the FIM did not satisfy the Treaty's Article 3 passenger ticket requirement, and thus the absence of the required delivery of a

passenger ticket. Under the latter determination, however, the respondents may not assert the Treaty's liability limitation. Article 3(2). App. D, p. D-4.

Absent a writ of certiorari, the Opinion of the D.C. Circuit, which has created a conflict among the federal and other appellate courts in the interpretation of the Convention on this question, and effected an impermissible judicial amendment, will unintentionally strike a damaging blow at the Convention and the rights thereunder of the millions of international air passengers and potential Warsaw plaintiffs against whom the Convention's terms are already heavily weighted disadvantageously.

II

DISMISSAL OF PETITIONERS' DISCRIMINATION CLAIMS WAS ERRONEOUS WHERE RESPONDENTS' CONDUCT AND MOTIVATIONS WERE OVERLOOKED AS LEGAL BASIS FOR CAUSE OF ACTION UNDER 49 U.S.C. 1374(b), (404(b)) AS AMENDED

A. Genuine issues of material facts necessary to be litigated exist as to petitioners' discrimination claims

As amended, 49 U.S.C. 1374(b) (Section 404(b)), provides in relevant part as follows:

> No air carrier or foreign air carrier shall . . . subject any particular person . . . in foreign air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

We note for this Court's attention that the 1983 repeal by 49 U.S.C. App. 1551 (a)(2)(B) of portions of Section 404(b) applies only to interstate and overseas air transportation - not foreign air transportation which is involved in this matter. Japan Air Lines Co., Ltd. v. Dole, 801 F.2d 483 (D.C. Cir. 1986), 255 U.S. App. D.C. 269, cert denied, 480 U.S. 917, 107 S. Ct. 1372, 94 L.Ed.2d 688 (1987).

This interpretation of the amendment which was questioned in Respondent TWA's Motion for Summary Judgment has never been addressed by this Court, an opportunity for which is presented by this petition.

The decisions of several federal courts have established that 404(b) creates for an aggrieved air passenger, a private damage federal cause of action in tort against the offending airline, where the passenger has been subjected to undue or unjust discrimination or harsh treatment. Also, punitive damages may be awarded under 404(b). See Wolgel v. Mexicana Airlines, 821 F.2d 442 (7th Cir. 1987) cert. denied, 108 S. Ct. 291, 98 L.Ed.2d 251 (1987); Mahaney v. Air France, 474 F. Supp. 532 (D.C.N.Y. 1979; Roman v. Delta Air Lines, 441 F. Supp. 1160 (D.C.Ill. 1977); Valentine v. Eastern Airlines, Inc., 365 A.2d 475, 144 N.J.Super. 305 (1976); Nader v. Allegheny Airlines,

Inc., 512 F.2d 527, 167 U.S.App.D.C. 350 (1975); Archibald v. Pan Am World Airways, 460 F.2d 14 (C.A.Guam 1972); Mortimer v. Delta Air Lines, 302 F. Supp. 276 (D.C.Ill. 1969); Flores v. Pan Am World Airways, 259 F. Supp. 402 (D.C.Puerto Rico 1966); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (D.C.Cal. 1961); Fitzgerald v. Pan Am World Airways, 229 F.2d 499 (C.A.N.Y. 1956).

The Court of Appeals' dismissal of the petitioners discrimination claims overlooked the respondents' conduct and the motivations underlying them and ignored these elements as legal basis for a discrimination cause of action under Section 404(b). Wolgel v. Mexicana Air Lines, 821 F.2d 442 (7th Cir. 1987) cert. denied, 108 S. Ct. 291, 98 L.Ed.2d 251 (1987); Mahaney v. Air France, 474 F. Supp. 532; Valentine v. Eastern Airlines, Inc., 365 A.2d 475, 144 N.J.Super. 305 (1976).

III

GENUINE ISSUES OF MATERIAL FACTS NECESSARY TO BE LITIGATED EXIST AS TO ACTS OF WILFUL MISCONDUCT BY THE RESPONDENTS

A. Elements of Respondents' wilful misconduct were overlooked by the lower court

Likewise, the Court of Appeals' conclusion that TWA had not "committed predicate "intentional or reckless acts" justifying a punitive damages award," App. A, infra, p. A-5-6 overlooked the standards for wilful misconduct established and alternatively stated by two venerable decisions of the D.C. and Second Circuits, respectively, and affirmed by this Court. See Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland v. Tuller, cert. denied, 292 F.2d 775 (D.C. Cir. 1961); 368 U.S. 921, 82 S. Ct. 243, 7 L.Ed.2d 136 (1961); (hereinafter KLM v. Tuller); Grey v. American Airlines, Inc., 227 F.2d 282, 285 (2d Cir. 1955), cert.

denied, 350 U.S. 989, 78 S. Ct. 478, 100 L.Ed. 855 (1956); see also American Airlines, Inc. v. Ulen, 186 F.2d 529 (D.C.Cir. 1949); Hill v. United Airlines, 550 F. Supp. 1048, 1056 (D.Kan. 1982). The Court of Appeals' conclusion also overlooked the special relationship between the petitioners and the respondents under Restatement (Second) of Torts, Sect. 46 and Sect. 48.

According to the Restatement, conduct considered "trivial" in some circumstances is often condemned as "outrageous" when it occurs in the context of such a "special relationship":

> The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests. Restatement (Second) of Torts, Sec. 46, comment e.

In fact, the Restatement contains a special rule for the type of "special

relationship" in issue here and which authorizes the recovery of damages for mental and emotional distress against a common carrier when its conduct has not been sufficiently egregious to be considered actionable under section 46:

> A common carrier or other public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility's servants while otherwise acting within the scope of their employment. Restatement (Second) of Torts, sec. 48.

The point is simply that the passenger of a common carrier is given a favored position in the law where wilful misconduct is concerned, and the passenger is therefore entitled to the benefit of the doubt in determining whether a particular common carrier defendant's wilful misconduct will be deemed actionable. Even if reading of the facts here have not initially elicited exclamation of "outrageous" from the Court, any doubt as to whether the defendant's

conduct is sufficiently outrageous, egregious or wanton to justify recognition of it as actionable for wilful misconduct, clearly must be resolved in petitioners' favor and submitted to the jury.

IV

THE TERMS OF THE WARSAW CONVENTION TREATY PERMIT RECOVERY OF PUNITIVE DAMAGES

A. **In actions governed by the Warsaw Convention Treaty, punitive damages allowed under local law may be recovered, where a carrier is liable for wilful misconduct or otherwise not entitled to assert the Treaty's liability limitation,**

The petitioners seek to recover punitive damages. The District Court concluded that punitive damages are not recoverable under the Warsaw Convention. App. B, p. B-14. The Court of Appeals did not reach this question, which presents this Court the opportunity to

address in order to resolve clearly existing conflict among courts in various Circuits.

The cases are equally divided on this issue. Several cases have held that punitive damages are recoverable in Warsaw Treaty cases when allowed by local law. In Re Hijacking of Pan American Aircraft at Karachi Airport, MDL-724 (S.D.N.Y. 1990); In Re Korean Air Lines Disaster of September 1, 1983, MDL-565 (D.D.C. 1989); Hill v. United Airlines, 550 F. Supp. 1048 (D.Kan. 1982); Cohen v. Varig Airlines, 380 N.Y.S.2d 450 (N.Y. Civ. Ct. 1975) rev'd 390 N.Y.S.2d 515 (App. Term 1976) aff'd 405 N.Y.S.2d 44 (App. Div. 1978). Several other cases have held that punitive damages are barred by the Convention. Floyd v. Eastern Airlines, 872 F.2d 1462 (11th Cir. 1989); In Re Air Disaster in Lockerbie, Scotland, MDL-799 (E.D.N.Y. 1990); In Re Air Crash Disaster at Gander, Newfoundland, 684 F. Supp. 927 (W.D.Ky. 1987);

Harpalani v. Air-India, 634 F. Supp. 797 (N.D.Ill. 1986).

The cases which hold that the Warsaw Convention bars punitive damages are based on incorrect reading or interpretation of the relevant provisions including (Articles 3, 4, 17, 18, 19, 24 and 25) and the Treaty's drafting history. These decisions add a new provision to the Treaty contrary to this Court's admonition in Chan v. Korean Airlines, ___ U.S. ___. 104 L.Ed.2d 113, 127 (1989), against judicial treaty making.

The Treaty should not be construed or judicially amended to override valid punitive damages claims. The Convention specifically entrusts the question of punitive damages to local law and should not be construed to bar plaintiffs' rights to recover such damages.

To disallow punitive damages would not promote the purpose of the Warsaw Convention Treaty. The goal of the Treaty was to grant a monetary damage limitation in the absence

of a carrier's wilful or other specified misconduct and, in the face of such misconduct, to allow all damages including punitive damages.

V

THE COURT OF APPEALS ERRONEOUSLY CONCLUDED ABSENCE OF DISCRETIONARY ABUSE IN THE MOOTNESS DISMISSAL OF PETITIONERS' PENDING MOTIONS

A. The District Court abused its discretion

The Court of Appeals' Opinion that there was no abuse of discretion by the District Court in dismissing petitioners' motions to amend their complaint, to compel discovery and for sanctions, clearly stands irreconcilable with those of several other federal appellate courts including the U.S. Supreme Court.

It is well settled that where sought, leave to amend a complaint "shall be freely given". Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962);

see also, Floyd v. Eastern Airlines, 872 F.2d 1462 (11th Cir. 1989); Epsey v. Wainwright, 734 F.2d 748 (11th Cir. 1984); Majd-Pour v. Georgiana Community Hospital, Inc., 724 F.2d 901 (11th Cir. 1984); Thomas v. Farmville Mfg. Co., Inc., 705 F.2d 1307 (11th Cir. 1983); Bamm, Inc. v. GAF Corp., 651 F.2d 389 (5th Cir. 1981); Miller v. Stanmore, 636 F.2d 986 (5th Cir. 1981); Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594 (5th Cir. 1981); Griggs v. Hinds Junior College, 563 F.2d 179 (5th Cir. 1977). See Halliburton & Associates, Inc. v. Henderson, Few & Co., 774 F.2d 441 (11th Cir. 1985). See generally, 3 Moore's Federal Practice, 15.08, 15.10 (2nd Ed. 1985); 6 Wright & Miller, Federal Practice & Procedure, Sect. 1487-88 (1971); Annotation, Timeliness of Amendments to Pleadings Made by Leave of Court Under Federal Rules of Civil Procedure 15(a), 4

A.L.R. FED. 123 (1970) (and supplement thereto).

Also, the Court of Appeals overlooked the principle that a Court's lack of subject matter jurisdiction does not preclude it from exercising its inherent jurisdiction over motions to impose sanctions under F.R.C.P. 11 and 28 U.S.C. 1927. Cooter & Gell v. Hartmarx Corp., 58 U.S.L.W. 4763, (U.S. June 11, 1990); Wojan v. General Motors Corp., 851 F.2d 969 (7th Cir. 1988); accord, Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987); Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc., 809 F.2d 451 (7th Cir. 1987); Orange Production Credit Ass'n. v. Frontline Ventures, Ltd., 792 F.2d 797 (9th Cir. 1986); Trohimovich v. C.I.R., 776 F.2d 873 (9th Cir. 1985); Hilgeford v. Peoples Bank, 776 F.2d 176 (7th Cir. 1985).

Likewise, justice is not served by the Court of Appeals' conclusion that the District Court did not abuse its discretion in permitting the respondents to deprive petitioners of the discovery sought. Cheers v. Chester Upland School District, 28 F.R.Serv.2d 535 (D.C.Pa. 1979); Harlem River Consumer Cooperative, Inc. v. Associated Grocers of Harlem, Inc., 54 F.R.D. 551 (D.C.N.Y. 1972).

VI

ASSERTION OF THE CONVENTION'S BAGGAGE DAMAGES LIMITATION IS IMPERMISSIBLE WHERE A CARRIER FAILED TO SATISFY ARTICLE 4 BAGGAGE CHECK REQUIREMENTS

Article 4(4) of the Convention, mandates the imposition of sanction for failure by the carrier to satisfy baggage check requirements.

The sanctions so mandated precludes the carrier from availing itself of those provisions which exclude or limit its liability.

The District Court's failure to recognize and impose this sanction was erroneous and impermissible in view of this Court's foreclosure in Chan v. Korean Airlines, Ltd., 109 U.S. 1676 of analytical reasoning which strips the language of its plain meaning and effect and results in judicial alteration of the Convention's plain language and its meaning.

VII

TARIFF FILED BY A CARRIER WHICH BARS RECOVERY OF CONSEQUENTIAL AND SPECIAL DAMAGES ARISING FROM CARRIAGE IS INCONSISTENT WITH THE LIABILITY AND RECOVERY OF DAMAGES PROVISIONS OF THE WARSAW CONVENTION

A. Respondents' assertion of Rule 55(C)(11) of IPR-2 is impermissible and invalid

The Rule 55(C)(11) provision which purports to bar recovery of consequential and special damages arising from carriage under the Convention, and in which the respondents have attempted to insulate themselves against

petitioners' claims for consequential and special damages, is inconsistent with the Treaty's provision for recovery of damages within liability limits prescribed therein, and thus is invalid.

Courts have held, in allowing recovery of consequential damages arising out of carriage, that a tariff filed by the carrier which barred recovery of consequential damages was violative of the Convention and could not be enforced. Hill v. United Airlines, 550 F. Supp. 1048 (D.C. Kan. 1982); Kupferman v. Pakistan International Airlines, 438 N.Y.S.2d 189 (N.Y. Civ. Ct. 1981); Cohen v. Varig, 380 N.Y.S.2d 450 (N.Y. Civ. Ct. 1975) rev'd 390 N.Y.S.2d 515 (App. Term 1976) aff'd 405 N.Y.S.2d 44 (App. Div. 1978).

CONCLUSION

For the reasons stated herein, a Writ of Certiorari should issue to the United States

Court of Appeals for the District of Columbia Circuit to review its judgment herein.

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED - SEE LOCAL RULE 14

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7128 September Term, 1989

C.A. No. 87-03352

Francis J. Thompson, et al.,

Appellants

v. FILED APR 20 1990

British Airways, Inc., et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Mikva, Buckley, and D.H. Ginsburg, Circuit Judges

J U D G M E N T

This case was considered on the record on appeal from the district court and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 14(c). It is

ORDERED and ABJUDGED that the district court's order of April 18, 1989 be remanded in part, and affirmed in part for the reasons stated in the attached memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

No. 89-7128 - Thompson v. British Airways

M E M O R A N D U M

A two-stage inquiry is necessary to determine whether the district court had jurisdiction over Thompson's complaint. First, the court must determine whether "treaty jurisdiction" exists under the language of the Warsaw Convention. See Kapar v. Kuwait Airways Corp., 845 F.2d 1100, 1104 (D.C. Cir. 1988); 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. 1502 (1982). The court would appear to have treaty jurisdiction over TWA on the basis of its being domiciled in the United States. T.S. No. 876 art. 28(1).

The question of treaty jurisdiction over UTA, however, is more problematic. UTA's domicile and principal place of business are in France. Furthermore, since the Flight Interruption Manifest allowing the Thompsons to travel via UTA was issued in London, "the

contract [was] made" there, rather than in Washington, D.C. Id. Similarly, the Thompsons' UTA flight was not part of a "single operation" of "undivided transportation." Therefore, their "destination" was Sierra Leone, not Washington, D.C. See In Re Alleged Food Poisoning Incident, March, 1984, 770 F.2d 3, 5 (2d Cir. 1985). Consequently, the district court lacked treaty jurisdiction as to UTA.

Second, the court must determine whether "domestic jurisdiction" is present. Kapar, 845 F.2d at 1104. Thompson's case exclusively "arose under" the Convention, a treaty signed by the United States. See St. Paul Ins. Co. v. Venezuelan Int'l Airways, 807 F.2d 1543, 1546 (11th Cir. 1987). Therefore, the court had jurisdiction under 28 U.S.C. 1331 (1982), as alleged in

No. 89-7128 - Thompson v. British Airways

Thompson's original complaint, regardless of his ability to satisfy the amount-in-controversy requirements of other jurisdictional statutes. For this reason, we remand this case for consideration of Thompson's breach of contract and negligence claims against TWA, which the court "d[id] not reach." Opinion, at 4.

We affirm, however, the district court's disposition of Thompson's discrimination and punitive damages claims. Thompson's discrimination allegations are "conclusory and devoid of factual basis," justifying dismissal. See McClure v. Esparze, 556 F. Supp. 569, 571 (E.D. Mo. 1983), aff'd, 732 F.2d 162 (8th Cir.), cert. denied, 471 U.S. 1052 (1984). Similarly, Thompson alleges no facts indicating that TWA committed predicate "intentional or reckless acts" justifying a

punitive damages award. See Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1486 (11th Cir. 1989). Therefore, the question of whether punitive damages may be recovered under the Warsaw Convention need not be reached.

Finally, we conclude that the court did not abuse its discretion in dismissing Thompson's motions to amend his complaint, to compel discovery, and for sanctions.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FRANCIS J. THOMPSON, et al.,

Plaintiffs. FILED APR 18 1989

v. Civil Action No. 87-3352

BRITISH AIRWAYS, et al.

Defendants.

MEMORANDUM

This matter is before the Court on defendant UTA French Airlines' ("UTA") motion for summary judgment, as well as, UTA's and defendant Trans World Airlines' ("TWA"), respective, motions to strike plaintiffs' claims for punitive damages and discrimination. Plaintiffs allege that this Court has jurisdiction pursuant to 404(b) of the Federal Aviation Act of 1958, as amended, 28 U.S.C. 1374(b), which gives rise to a federal question by means of 28 U.S.C. 1337,

and pursuant to 28 U.S.C. 1332, in that there is true diversity of citizenship and the amount in controversy exceeds $10,000. Plaintiffs' Second Amended Complaint ("Plaintiffs' Complaint") at par. 1.

Plaintiffs in this case are Francis J. Thompson and Eleanor J. Thompson, and their children, Francis C. Thompson and Eleanor D. Thompson, who are minors. Plaintiffs Francis J. Thompson and Eleanor J. Thompson are pro se and represent the interest of their children. The two remaining defendants are TWA and UTA; British Airways and KLM Royal Dutch Airlines have been dismissed from the suit.

I.

This suit arises out of a trip that the plaintiffs took on or about December 11, 1985, from Washington, D.C. to Freetown, Sierra Leone. Some of the facts in this case are in dispute. The following are the

underlying facts which appear not to be in dispute. Plaintiffs' tickets were purchased and issued in the District of Columbia for travel from Washington National Airport (National) to Freetown, Sierra Leone. The performance of plaintiffs' original ticket was to be as follows: Washington, D.C. to New York by TWA; New York to Amsterdam by KLM; Amsterdam to Freetown by KLM; Freetown to London by British Caledonian; and London to Washington, D.C. by British Airways.

Plaintiffs' TWA flight 704 was delayed at National and as a result plaintiffs missed their connecting flight. TWA then issued plaintiffs a Flight Interruption Manifest in lieu of their tickets, whereby they were to travel on December 12, 1985, aboard TWA from New York to London, and from London on to Freetown. The plane arrived late in London on December 13, 1985, which caused the plaintiffs to miss their connections and

remain overnight in London. Plaintiffs last saw their baggage at Heathrow Airport in London. TWA then reissued the Flight Interruption Manifest to take the plaintiffs aboard British Airways from London to Paris, where they would board a UTA plane for the flight to Freetown.

When the plaintiffs arrived in Paris on December 14, they discovered that the UTA flight did not depart until the next day. On the morning of December 15, 1985, the plaintiffs boarded UTA Flight 8029 at Charles DeGaulle Airport after checking in at the Economy Counter. After boarding the aircraft, the plaintiffs announced that their tickets were for Business Class and took seats in the Business Class section, even though the Flight Interruption Manifest read Economy. Plaintiffs informed UTA that it was a downgrading error by TWA. UTA requested the plaintiffs to change their seats to

Economy Class, but the plaintiffs refused. UTA did not serve the plaintiffs any food or beverage.

Upon landing in Freetown, the plaintiffs discovered that their baggage had not arrived. The UTA agent in Freetown then completed a baggage report and attempted to locate the luggage. On December 19, 1985, UTA delivered the luggage to the plaintiffs' residence. Upon the plaintiffs' request, UTA had a few damaged pieces repaired in Freetown.

Plaintiffs filed their complaint in the Court against TWA and UTA under the Warsaw Convention alleging discrimination, negligence, and breach of contract. In addition, plaintiffs seek punitive damages.

For the reasons discussed below, the Court concludes that UTA's motion for summary judgment should be granted. Further, the Court concludes that UTA's and TWA's motions

to strike plaintiffs' claims for punitive damages and discrimination should be granted.

II.

UTA has moved for summary judgment on the following grounds: (1) plaintiffs cannot meet the diversity jurisdiction requirement because the amount in controversy is less than ten thousand dollars, (2) there is no evidence of discrimination by UTA, (3) UTA was not negligent, (4) plaints were contributorily negligent, (5) UTA did not breach its contract with plaintiffs, and (6) UTA is not liable for plaintiffs' lost opportunity. Additionally, UTA has moved in the alternative for summary judgment against TWA with respect to Count III of its cross claim against TWA. Because the Court finds that plaintiffs fail to meet the ten thousand dollar jurisdictional requirement, the Court

does not reach the other arguments.1

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. See, 49 U.S.C. 1502, Order of Civil Aeronautics Board Approving Increases in Liability Limitation of Warsaw Convention and Hague Protocol.

The parties agree that the Warsaw Convention is applicable to this case.

Plaintiffs state: "Article 22 of the Convention establishes limitations upon liability of the carrier under the

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1 UTA filed a Supplemental Motion for Summary Judgment in which it argues that this Court lacks subject matter jurisdiction pursuant to Article 28(1) of the Warsaw Convention Act. The Court need not address this issue.

circumstances covered by Articles 17, 18 and 19." Plaintiffs' Supplemental Opposition to Defendant UTA's Motion and Supplemental Motion for Summary Judgment ("Plaintiffs' Supplemental Opposition") at 3. However, plaintiffs further state that "the Convention also delineates conditions under which limitations and exclusion of liability of the carrier shall not apply." Id. Article 25 of the Convention states:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

49 U.S.C. 1502. The Court concludes, viewing the facts most favorable to the plaintiffs, that the plaintiffs have not alleged facts that constitute wilful misconduct. The requirement of wilful misconduct is a high standard which includes

a "conscious intent". See, Martin v. Pan American World Airways, Inc, 563 F. Supp. 135 (D.D.C. 1983). Moreover, plaintiffs' claims of wilful misconduct do not address their baggage claims, but goes more to the mistreatment they felt they received by the airlines on the plane and the scheduling of the flights.

The Court finds that the Warsaw Convention's limitations on damages is controlling in this case. The Warsaw Convention provides:

> In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires.2

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2 The conversion to United States dollars would be $9.07 per pound.

Article 22(2), 49 U.S.C. 1502. The Warsaw Convention provides that a baggage claim must contain "the number and weight of the packages." Article 4(3)(f). Further, "if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability." Article 4(4).

There is nothing in the record to suggest that the baggage claims contain the number and weight. UTA contends that this action is subject to the International Passenger Rules Tariff No. IPR-2, C.A.B. No. 376, for which they are a participating carrier. UTA's Memorandum In Support of UTA's Motion for Summary Judgment at 6, Exhibit 6. They further argue that pursuant to the Tariff

agreement "the maximum allowable weight to be used in interline transportation where TWA is the originating carrier is 62 pounds." Id. at 8. UTA represents that plaintiffs claim that items were missing from six bags. Id. Plaintiffs have not controverted that assertion. UTA submits that "[i]n multiplication of this maximum allowable weight times the number of bags from which [p]laintiffs claim items were missing, six times $9.07 per pound, [p]laintiffs maximum recovery would only be $3,374.04." Id.

Plaintiffs argue that UTA can not avail itself of the carrier liability exclusion under their Tariff agreement, because it stands subordinate and conflicting to Article 25 of the Warsaw Convention. Plaintiffs' Supplemental Opposition at 4. Plaintiffs cite to Article 33 of the Warsaw Convention, which holds:

> Nothing contained in this convention shall prevent the carrier either from

> refusing to enter into any contract of transportation or from making regulations which do not conflict with the provision of this convention.

Id. (emphasis provided by plaintiffs). The Court disagrees with plaintiffs' argument that the tariff agreement conflicts with a provision of the Warsaw Convention. In Martin v. Pan American World Airways, Inc., the court held that a similar tariff agreement "properly supplements Convention Article 4, and represents an appropriate accommodation of the need to preserve limited liability for property damage, and the need to ensure some means of fixing the amount of liability." 563 F.Supp. at 140. The court in Martin, further noted that "[t]he tariff provides an alternative means of fixing the amount of liability, and the record keeping purpose of the weight requirement is satisfied." Id. This Court will follow Martin, in concluding the application of the tariff agreement is consistent with the

relating to enter into any contract of transportation or from making regulations which do not conflict with the provision of this convention.

Id. (emphasis provided by plaintiff). The Court disagrees with plaintiff's argument that the tariff agreement conflicts with a provision of the Warsaw Convention. In Martin v. Pan American World Airways, Inc., the court held that a similar tariff agreement "properly supplements Convention Article 4, and represents an appropriate accommodation of the need to preserve limited liability for property damage, and the need to ensure some means of fixing the amount of liability." 567 F.Supp. at 190. The court in Martin, further noted that "[t]he tariff provides an alternative means of fixing the amount of liability, and the record regarding purpose of the weight requirement is satisfied." Id. This Court will follow Martin. In concluding the application of the tariff agreement is consistent with the

purpose of the Warsaw Convention.

In view of the above, the Court concludes that the maximum amount that plaintiffs can claim is $3,374.04. Accordingly, plaintiffs failed to satisfy the jurisdictional amount of $10,000.00 pursuant to 28 U.S.C. 1332 and 1337.

III.

This Court is further presented with the question whether the Warsaw Convention provides the exclusive liability remedy for international air carriers. This Court will follow other circuits which held that the Warsaw Convention creates the cause of action and is the exclusive remedy. See, Boehringer-Mannheim Diagnostics v. Pan Am World, 737 F.2d 456 (5th Cir. 1984); Benjaminins v. British European Airways, 572 F.2d 913 (2d Cir. 1978); In re Mexico City Air Crash of October 31, 1979, 708 F.2d 400 (9th Cir. 1983). As the Court noted earlier,

purpose of the Warsaw Convention.

In view of the above, the Court concludes that the maximum amount that plaintiffs can claim is $63,374.04. Accordingly, plaintiffs failed to satisfy the jurisdictional amount of $10,000.00 pursuant to 28 U.S.C. 1332 and 1337.

III.

This Court is further presented with the question whether the Warsaw Convention provides the exclusive liability remedy for international air carriers. This Court will follow other circuits which hold that the Warsaw Convention creates the cause of action and is the exclusive remedy. See, Domingues-Cardoso Diagnostics v. Pan Am World, 727 F.2d 456 (5th Cir. 1984); Domingues v. British European Airways, 572 F.2d 913 (2d Cir. 1978); In re Mexico City Air Crash of October 31, 1979, 708 F.2d 400 (9th Cir. 1983). As the Court notes earlier,

the purpose of the Warsaw Convention was to create a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. The Court is constrained to find that the Warsaw Convention is the exclusive remedy in order to effectuate the purpose of the Convention. See, Bacardi Corp. v. Domenech, 311 U.S. 150, 163, 61 S.Ct. 219, 225 (1940).

The Court concludes with respect to plaintiffs' claim for punitive damages that the claim must be stricken. The Court has already concluded that the plaintiffs have failed to make out a claim for wilful misconduct. Therefore, the claim is controlled by the liability limitation of the Warsaw Convention. Further, the Court finds that punitive damages are not available under the Warsaw Convention. The Warsaw Convention provides a liability limitation;

to allow for punitive damages would go against the intent of the Convention.

With respect to plaintiffs' claim for discrimination, the Court finds that plaintiffs have failed to plead facts that allege discrimination. The Court recognizes that plaintiffs did have an unpleasant trip and there was confusion regarding their flight schedules and the services they were to receive; however, there is nothing in the record that suggest the problems were racially motivated. Every day people are faced with problems of travel, particularly international travel, and there are often unforeseen problems that are beyond the control of the airlines. Though the actions used by TWA's and UTA's agents in addressing the problems are open to question, there is nothing to suggest a claim for discrimination. Accordingly, the Court concludes that plaintiffs' discrimination

claim should be stricken.

IV.

As discussed above, the Court concludes that the Warsaw Convention provides the plaintiffs with their exclusive remedy. Further, the Court concludes that under the Warsaw Convention, the maximum amount the plaintiffs can claim is $3,374.04. Accordingly, plaintiffs fail to satisfy the jurisdiction amount pursuant to 28 U.S.C. 1332 and 1337 and this case should be dismissed.

An appropriate Order accompanies this Memorandum.

Date: APR 18 1989

/s/ JOHN GARRETT PENN
JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FRANCIS J. THOMPSON, et al.,

Plaintiffs. FILED APR 18 1989

v. Civil Action No. 87-3352

BRITISH AIRWAYS, et al.

Defendants.

O R D E R

For the reasons discussed in the accompanying Memorandum, it is hereby

ORDERED that UTA's motion for summary judgment is granted, it is further,

ORDERED that UTA's motion to strike plaintiffs' claim for punitive damages and discrimination is granted, it is further

ORDERED that TWA's motion to strike plaintiffs' claims for punitive damages and discrimination is granted, it is further

ORDERED that any pending motions in this case are denied as moot, it is further

ORDERED that this case is dismissed.

Date: APR 18 1989

/s/ JOHN GARRETT PENN
JOHN GARRETT PENN
United States District Judge

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7128 September Term, 1989

C.A. No. 87-03352

Francis J. Thompson, et al.,

Appellants

v. FILED JUN 29 1990

British Airways, Inc., et al.

BEFORE: Mikva, Buckley, and D.H. Ginsburg,
Circuit Judges

O R D E R

Upon consideration of appellants' petition for rehearing, filed May 21, 1990, it is

ORDERED, by the Court, that the petition is denied.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7139 September Term, 1989

C.A. No. 87-01332

Francis J. Thompson, et al.,

Appellants

v. FILED JUN 27 1990

British Airways, Inc., et al.,

Appellees

Before: Mikva, Buckley, and C.H. Quinbury,

Circuit Judges

O R D E R

Upon consideration of appellants' petition for rehearing, filed May 21, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX D

CONVENTION FOR UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR

WARSAW CONVENTION

Relevant Provisions

CHAPTER I. SCOPE - DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within a territory subject to the sovereignty,

CONVENTION FOR UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR

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(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within a territory subject to the sovereignty,

suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory

subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I. PASSENGER TICKET

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II. BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II. BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which

the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22(2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or

wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to

take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of

take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

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liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(4) The sums mentioned above shall be deemed to refer to the french franc consisting of 65-1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

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Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting

Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is

performed under his supervision.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

Article 33

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

APPENDIX E

Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol
Agreement CAB 18900

MONTREAL AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

> "The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as

amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.

(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with

respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on

(i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of

E-4

(i) Each ticket (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket or (iii) on the ticket envelope.

NOTICE TO INTERNATIONAL PASSENGER OF LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain types of

carrier) and certain other* carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US 475,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $8,290 or US $16,580.

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* Either alternative may be used.

APPENDIX F

F-1

INTERNATIONAL PASSENGER RULES
TARIFF NO. IPR-2, C.A.B. NO. 376

PARTIAL LIST OF PARTICIPATING CARRIERS

This tariff is issued and filed with the Canadian Transport Commission (Air Transport Committee) and the Department of Transportation by Airline Tariff Publishing Company, Agent, for and on behalf of the following participating carriers under authority of their powers of attorney and concurrences filed with the Canadian Transport Commission (Air Transport Committee) and the Department of Transportation.

PARTICIPATING CARRIER	CARRIER ABBREVIATION	POWER OF ATTORNEY C.A.B
TRANS WORLD AIRLINES, INC.	TW	NO. 28
UNION DE TRANSPORTS AERIENS (U.T.A.)	UT	NO. 7

IPR-2 RULE 55
SECTION 1 - GENERAL RULES

LIABILITY OF CARRIERS

(A) SUCCESSIVE CARRIERS

Carriage to be performed under one ticket or under a ticket and any conjunction ticket issued in connection therewith by several successive carriers is regarded as a single operation.

(B) LAWS AND PROVISIONS APPLICABLE

(1) (a) (Applicable to AA, AC, AF, AI, AL, AV, AY, AZ, BA, BR, CO, CP, CU, CY, DL, EA, EI, ET, FF, FJ, FL, HA, HK, IB, JL, JW, KL, LB, ME, MS, NE, NW, NY, OA, OS, OZ, PA, +*PH, PK, OF, RC, SA, SK, SN, SR, TE, TW, UA, WA, WD and WO only.)

(2) Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs, . . . and for the

purpose of the Convention the agreed stopping places (which may be altered by carrier in case of necessity) are those places, except the place of departure and the place of destination set forth in the ticket and any conjunction ticket issued therewith, or shown in carrier's timetable as scheduled stopping places on the passenger's route.

(C) LIMITATION OF LIABILITY

(11) Carrier shall not be liable in any event for any consequential or special dmage arising from carriage subject to this tariff, whether or not carrier had knowledge that such damages might be incurred.

APPENDIX G

Federal Aviation Act of 1958,

49 U.S.C. 1374(b), (Sec. 404(b))

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of tariff in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Federal Aviation Act of 1958, 49 U.S.C. 1374(b), (Sec. 404(b)), as amended, 49 U.S.C. App. 1551(a)(2)(B) and 1551(a)(4)(C)

(2) The following provisions of this chapter (to the extent such provisions relate to interstate and overseas air transportation

of persons) and the authority of the Board with respect to such provisions (to the same extent) shall cease to be in effect on January 1, 1983:

(B) Section 1374 of this title (except insofar as such section requires air carriers to provide safe and adequate service).

(4) The following provisions of this chapter (to the extent such provisions relate to interstate and overseas air transportation of persons) and the authority of the Board with respect to such provisions (to the same extent) shall cease to be in effect on January 1, 1985 (emphasis added):

(C) Section 1374 of this title (except insofar as such section requires air carriers to provide safe and adequate service).

Definitions to the Federal Aviation Act of 1958, 49 U.S.C. 1301

Definitions

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: Provided, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

(19) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

(21) "Interstate air transportation", "overseas air transportation", and "foreign

air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively -

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or

possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

APPENDIX H

Supplement to the Local Civil Rules of the United States District Court for the District of Columbia, 1986 edition as amended, p. 51-A

HOW TO FILE SEALED MATERIAL

(a) Original material and the Judge's copy must be placed in separate sealed envelopes, identified as original and copy.

(b) Pertinent information must be noted on the front of each envelope, such as:

(1) Civil Action Number assigned to the case.

(2) Judge/Magistrate assigned to the case.

(3) Date of filing.

(4) Brief description of the material.

Note: The description should be worded so as not to disclose the confidential nature of the filing.

EXAMPLE: Affidavit in support of deft's motion to dismiss.

APPENDIX I

I-1

Counsel's liability for excessive costs,
28 U.S.C. 1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

APPENDIX J

Federal Rules of Civil Procedure; Rules 11, 15, 33 and 37

Rule 11. Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Federal Rules of Civil Procedure
Rules 11, 16, 23 and 37

Rule 11. Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

FRCP 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Rule 33. Interrogatories to Parties

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served . . . . The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

Rule 37. Refusal to Make Discovery: Consequences

(d) Failure of Party to Attend or Serve Answers. If a party . . . fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

(2)

No. 90-581

Supreme Court, U.S.
FILED
DEC 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FRANCIS J. THOMPSON, ET AL.,

Petitioners,

vs.

BRITISH AIRWAYS, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT UTA FRENCH AIRLINES IN OPPOSITION

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Of Counsel:
DAVID C. KRAUS

QUESTIONS PRESENTED

Whether jurisdiction under Art. 28(1) of the Warsaw Convention can be conferred on UTA where the UTA flight was not regarded by the parties as part of a single operation of undivided transportation.

Whether the UTA flight from Paris to Freetown was regarded by the parties as a part of a single operation of undivided transportation as defined by Article 1(3) of the Warsaw Convention.

PARTIES TO THE PROCEEDING

Petitioners:

Francis J. Thompson
Eleanor J. Thompson
Francis C. Thompson
Eleanor D. Thompson

Respondents:

UTA French Airlines[1]
Trans World Airlines, Inc.

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[1] In compliance with Rule 28.1 of The Supreme Court, UTA French Airlines has the following subsidiaries and affiliates: Aeromartime; UTH; Sodetraf; Air Inter; Societe Polynesienne Des Villages De Vacanes; Revima; CRMA; and UTA Services Tahiti.

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Petrire v. Spantax, S.A., 756 F.2d 263 (2nd Cir. 1985) 24, 25

Treaties:

The Convention For the Unification of Certain Rules Relating to International Carriage By Air (Warsaw Convention) 49 Stat. 3000, T.S. No. 876, 49 USC 1502 note.... 7n

OPINIONS BELOW

The following is the decision of the Court of Appeals filed April 20, 1990.

NOT TO BE PUBLISHED - SEE LOCAL RULE 14

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-7128 September Term, 1989

C.A. No. 87-03352

Francis J. Thompson, et al.,

Appellants

v. FILED APR 20 1990

British Airways, Inc., et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Mikva, Buckley, and D.H. Ginsburg, Circuit Judges

JUDGMENT

This case was considered on the record on appeal from the district court and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 14(c).

It is ORDERED and ADJUDGED that the district court's order of April 18, 1989 be remanded in part, and affirmed in part for the reasons stated in the attached memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

MEMORANDUM

A two-stage inquiry is necessary to determine whether the district court had jurisdiction over Thompson's complaint. First, the court must determine whether "treaty jurisdiction" exists under the language of the Warsaw Convention. See Kapar v. Kuwait Airways Corp., 845 F.2d 1100, 1104 (D.C. Cir. 1988); 49 Stat. 3000, T>S. No. 876 (1934), reprinted in note following 49 U.S.C. § 1502 (1982). The court would appear to have treaty jurisdiction over TWA on the basis of its

being domiciled in the United States. T.S. No. 876 art. 28(1).

The question of treaty jurisdiction over UTA, however, is more problematic. UTA's domicile and principal place of business are in France. Furthermore, since the Flight Interruption Manifest allowing the Thompsons to travel via UTA was issued in London, "the contract [was] made" there, rather than in Washington, D.C. Id. Similarly, the Thompsons' UTA flight was not part of a "single operation" of "undivided transportation." Therefore, their "destination" was Sierra Leone, not Washington, D.C. See In Re Alleged Food Poisoning Incident, March, 1984, 770 F.2d 3, 5 (2d Cir. 1985). Consequently, the district court lacked treaty jurisdiction as to UTA.

Second, the court must determine whether "domestic jurisdiction" is present. Kapar, 85 F.2d at 1104. Thompson's case exclusively "arose under" the Convention, a treaty signed by the United States. See St. Paul Ins. Co. v. Venezuelan Int'l Airways, 807 F.2d 1543, 1546 (11th Cir. 1987). Therefore, the court had jurisdiction under 28 U.S.C. § 1331 (1982), as alleged in Thompson's original complaint, regardless of his ability to satisfy the amount-in-controversy requirements of other jurisdictional statutes. For this reason, we remand this case for consideration of Thompson's breach of contract and negligence claims against TWA, which the court "d[id] not reach." Opinion, at 4.

We affirm, however, the district court's disposition of Thompson's

discrimination and punitive damages claims. Thompson's discrimination allegations are "conclusory and devoid of factual basis," justifying dismissal. See McClure v. Esparza, 556 F. Supp. 569, 571 (E.D. Mo. 1983), aff'd, 732 F.2d 162 (8th Cir.), Cert. denied, 471 U.S. 1052 (1984). Similarly, Thompson alleges no facts indicating that TWA committed predicate "intentional or reckless acts" justifying a punitive damages award. See Floyd v. Eastern Airlines, Inc., 872 F.2d 1462, 1486 (11th Cir. 1989). Therefore, the question of whether punitive damages may be recovered under the Warsaw Convention need not be reached.

Finally, we conclude that the court did not abuse its discretion in dismissing Thompson's motions to amend his complaint, to compel discovery, and for sanctions.

PROVISIONS OF LAW INVOLVED

Warsaw Convention[2]

Article 1 (3):

> Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this Convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

---

[2] The Convention for the Unification of Certain Rules Relating to International Carriage by Air, 49 Stat. 3000, T.S. No. 876, 49 USC §1502 note.

Article 28 (1)

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the Court at the place of destination.

Article 30 (1)

In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this Convention, and shall be deemed to be one of the contracting parties to the contract of transportation in so far as the contract deals with that part of the transportation which is performed under his supervision.

STATEMENT OF THE CASE

THE FLIGHTS

On December 11, 1985, Petitioners started on a trip from Washington, D.C. to Freetown, Sierra Leone. Their air tickets were purchased and issued in Washington, D.C. and contained the following itinerary:

1. Washington, D.C. to New York, N.Y. on TWA
2. New York, N.Y to Amsterdam on KLM
3. Amsterdam to Freetown on KLM
4. Freetown to London on British Caledonia
5. London to Washington, D.C. on British Airways.

The Petitioners began their trip with a delay of the TWA flight in Washington, D.C. which caused them to miss their

connecting flight on KLM in New York. As a result, TWA issued a flight interruption manifest placing the Petitioners on TWA flights from New York to London and London to Freetown on December 12, 1985.

The TWA flight to London arrived late causing the petitioners to miss their connecting flight to Freetown and remain in London overnight.

TWA then placed the petitioners on a British Airways flight to Paris on December 14, 1985 where they would connect with a UTA flight to Freetown. Petitioners last saw their baggage in the custody of TWA at Heathrow Airport in London.

When the Petitioners arrived in Paris on December 14, 1985 they discovered that the UTA flight was not scheduled to depart

for Freetown until the next day which required Petitioners to remain overnight in Paris.

Although the Petitioners purchased business class seats for their trip, TWA only booked economy or coach seats when it rerouted the Petitioners on the British Airways and UTA flights.

Apparently TWA rectified the class of travel for the British Airways flight but did nothing or was unable to do anything for the class of travel on the UTA flight.

Upon boarding the UTA flight, Petitioners erroneously assumed they had business class seats and sat in that section and refused to move. Petitioners claim they did not receive any amenities on the UTA flight.

Upon arrival in Freetown Petitioners discovered that their baggage was not on the flight. A baggage loss report was filed and a search was commenced to locate the baggage. UTA provided Petitioners with an interim baggage allowance. On December 19, 1985 after TWA found and expedited the missing baggage to UTA, UTA delivered the baggage to the Petitioners. UTA also had a few damaged pieces of baggage repaired in Freetown.

UTA had no further contact with the Petitioners until approximately 18 months later in May 1987 when UTA received a letter from Petitioners claiming certain items were missing from their luggage. The claim was denied as untimely and unsubstantiated.

DISTRICT COURT ACTION

On December 11, 1987, the Thompsons filed an action in the United States District Court for the District of Columbia under the Warsaw Convention alleging breach of contract, negligence, discrimination, wilful misconduct and punitive damages. The action was commenced against British Airways, KLM, TWA and UTA. The action was later dismissed against British Airways and KLM.

SUMMARY JUDGMENT

In November, 1988 UTA filed a motion for summary judgment on the grounds that:

1. the amount in controversy was less than $10,000

2. the district court lacked subject matter jurisdiction pursuant to Art. 28(1) of the Warsaw Convention

3. there was no evidence of discrimination by UTA

4. there was no evidence of negligence by UTA

5. plaintiffs were contributorily negligent

6. UTA did not breach its contract with plaintiffs

7. UTA was not liable for plaintiffs' lost opportunity.

In March of 1989 UTA and TWA moved to strike plaintiffs' claims for punitive damages and discrimination.

On April 18, 1989, the district court granted UTA's motion for summary judgment and UTA's and TWA's motion to strike plaintiffs' claim for punitive damages and discrimination.

The district court in granting UTA's motion for summary judgment held that plaintiffs failed to meet the $10,000

jurisdictional requirement and that as such the court did not reach the other grounds or arguments submitted by UTA.

The court noted that the parties had agreed that the provisions of the Warsaw Convention were applicable to the case and that the plaintiffs had argued that the defendants were guilty of wilful misconduct as referred to in Art. 25 thereof which precludes the defendants from availing itself of the limitation of liability provisions. The court, however, found that plaintiffs failed to allege any facts which would constitute wilful misconduct especially regarding the baggage claims which under Art. 22 were limited to a maximum amount of $3,374.04.

In striking the claims for punitive damages and discrimination, the court held the Warsaw Convention provides the

exclusive remedy for plaintiffs' claims and that punitive damages are not available thereunder. The court also found that plaintiffs had failed to make out a case for wilful misconduct and discrimination.

THE APPEAL

The plaintiffs appealed the district court's decision arguing that the district court had jurisdiction over TWA and UTA and the dismissal of punitive damage and discrimination claims were in error.

The Court of Appeals, in remanding in part and affirming in part, the district court's decision, addressed the jurisdictional issue in two stages.

The court first considered whether "treaty jurisdiction" under Art. 28(1) of

the Warsaw Convention existed over TWA and UTA.

Art. 28(1) states:

> "(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the Court at the place of destination.

In applying the above criteria, the court held that since TWA was domiciled in the U.S., treaty jurisdiction existed over TWA.

With regard to UTA, the court came to the opposite conclusion and held that since UTA was a French corporation and the issuance of the UTA tickets occurred in London with Freetown as the destination,

none of the criteria of Art. 28(1) applied and the court lacked treaty jurisdiction over UTA.

Secondly, the court considered whether "domestic jurisdiction" was present for federal court purposes. The court found that since the case arose exclusively under the Warsaw Convention, (a treaty signed by the U.S.) federal court jurisdiction existed under 28 U.S.C. 1331, (federal question). The Court of Appeals disagreed with the district court's finding that diversity (28 U.S.C. 1332) was the basis for federal court jurisdiction. Upon this reasoning, the court remanded the case for consideration of the breach of contract and negligence claims against TWA which the district court did not reach.

In addition, the Court of Appeals affirmed the district court's dismissal of the discrimination and punitive damage claims on the grounds that the discrimination allegations were conclusory with no basis in fact and that plaintiffs alleged no facts indicating that TWA committed predicate intentional or reckless acts justifying a punitive damages award. Since the court found no basis in fact supporting a punitive damage award, the court did not reach the question as to whether punitive damages may be recovered under the Warsaw Convention.

Plaintiffs' petition for a rehearing was denied June 29, 1990.

SUMMARY OF ARGUMENT

The facts of this case clearly demonstrate that the parties (carriers and passengers) did not regard the UTA flight as part of a single operation of undivided transportation pursuant to the provisions of the Warsaw Convention.

Therefore, UTA was not a successive carrier; the destination was not Washington D.C.; and the district court did not have jurisdiction over UTA under Article 28(1) of the Warsaw Convention.

Petitioners have failed to show that the Court of Appeals decision with respect to UTA is in conflict with the decision of another federal court of appeals or that this case otherwise presents special and important reasons for granting Petitioners Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The Court of Appeals Correctly Held That The District Court Did Not Have Jurisdiction Over UTA Under Article 28(1) of the Warsaw Convention

Plaintiff brought this action under the Warsaw Convention, an international treaty governing international transportation of passengers and property by air carriage, by filing a summons and complaint in the United States District Court for the District of Columbia.

Pursuant to Article 28(1) of the Convention, an action may only be brought before a court in the territory of a High Contracting Party:

1. where the air carrier is domiciled, or

2. where the air carrier has its principal place of business, or

3. where the transportation contract was made, or

4. at the destination of the transportation.

It is undisputed that the first three criteria do not subject UTA to the jurisdiction of the United States District Court for the District of Columbia. UTA is a French airline which is domiciled and has its principal place of business in France, not in Washington, D.C. In addition, the contract for carriage on the UTA flight was made by TWA in London after the TWA flight from New York arrived late causing Petitioners to miss the TWA flight to Freetown. It is clear that the first three criteria do not serve as a basis for U.S. District Court jurisdiction in Washington D.C.

With regard to the fourth condition, it is equally clear, for the reasons set

forth below that Washington, D.C. was not the destination of the UTA flight and therefore also cannot serve as a basis for U.S. District Court jurisdiction over UTA.

The Court of Appeals in affirming the dismissal of the complaint against UTA found that since the UTA flight was not part of a single operation of undivided transportation, Washington, D.C. was not the "destination" for the purposes of jurisdiction under Article 28(1).

Petitioners assert that this decision is in conflict with decisions of other federal courts which have held that in cases of round-trip carriage involving successive carriers, the place of destination is the same as the place where the journey originated. Petitioners' assertion is erroneous as the Court of

Appeals decision is not in conflict with the stated rule of law.

In determining the place of "destination" when more than one carrier is involved the courts look to the definition of transportation by successive air carriers as set forth in Article 1(3) of the Warsaw Convention:

> "Transportation to be performed by several successive air carriers shall be deemed, for the purposes of the convention to be one undivided transportation, if it has been regarded by the parties as a single operation..."

This definition was followed by the court in Petrire v. Spantax, S.A., 756 F.2d 263, 26C (2nd Cir. 1985), wherein it was held that:

> "...when different carriers are involved, the pertinent unit of travel for determining the 'destination' is the 'single operation' of

> undivided transportation as regarded by the parties."

In Petrire, supra, the court found that because the tickets were issued at the same time and place the parties regarded the return trip from New York to Spain as part of a single operation of undivided transportation. Hence, the destination was determined to be Spain and the airline's motion to dismiss for lack of jurisdiction was granted and affirmed:

> "...when the parties have contemplated a single operation of undivided transportation only one destination exists..." In Re Alleged Food Poisoning Incident, March 1984, 770 F.2d 3, 4 (2nd Cir. 1985).

Conversely, if the parties do not regard the flight as part of a single operation of undivided transportation the carrier of that flight is not a "successive carrier" under Article 30(1)

and 1(3) and not subject to Art. 28(1) jurisdiction based on the destination of other flights in the transportation.

Herein lies the flaw to Petitioners' assertion as Petitioners erroneously assume that UTA was found to be a "successive carrier" under the provisions of the Convention. The Court of Appeals made no such finding.

The key question in determining the place of "destination" as well as whether or not a different carrier is considered a successive carrier is the same, i.e., was the UTA flight regarded by the parties as part of a single operation of undivided transportation?

The facts of this case clearly demonstrate that the parties did <u>not</u>

regard the UTA flight as part of a single operation of undivided transportation.

UTA had no dealings with Petitioners in selecting or contracting the UTA flight from Paris to Freetown. This was done by TWA, who unilaterally and without agreement from Petitioners rerouted Petitioners on UTA. The UTA flight was not made part of Petitioners' undivided transportation as evidenced by the fact that UTA was unaware of Petitioners' flight itinerary and class of travel (business class) which apparently caused some confusion when petitioners checked in and boarded the UTA flight to Freetown. Had UTA regarded the flight as part of a single operation it would have known of and provided for business class travel for the Petitioners. TWA merely rerouted the Petitioners on UTA.

In Briscoe v. Compagne Nationale Air France, 290 F. Supp 863 (USDC SDNY 1968) plaintiff purchased a round trip ticket on Air France from New York to Paris to Belgrade with the dates and the flights of the return trip left open. While in Balgrade plaintiff decided to leave when Air France did not have a flight. Air France accommodated plaintiff and changed the ticket to a flight on Yugoslav Airways from Belgrade to Paris with a stop in Munich. Plaintiff was injured in the flight in Munich.

The issue in the case was whether Yugoslav Airways was a "successive carrier" under Art. 30(1). The court held that it was, because the parties agreed and amended the contract of carriage by designating Yugoslav Airways as the carrier from Belgrade to Paris.

The Court also took the position that where one air carrier engages another carrier without the passenger's agreement, to perform part or all of the carriage, there would be no successive carriage, only a substitution. Briscoe, supra, at page 867.

In In Re Air Crash Disasters At Warsaw, Poland, on March 14, 1980, 748 F.2d 94 (2nd Cir. 1984) where the issue involved notice to the passenger of the Warsaw limitations of liability, the court found that the passenger did not regard the domestic flight and international flight as a single operation:

> "Under Article 1(3) all parties - the successive carriers as well as the passengers - must regard the domestic and overseas flights as a single operation."

Article 1(3) of the Convention and the decisions cited above clearly require that all parties (carriers and passengers) regard the flight as part of a single operation of undivided transportation in order to establish destination as a basis for jurisdiction under Article 28(1).

Clearly, the UTA flight was not regarded by the parties as part of a single operation of undivided transportation. It therefore follows that UTA was not a "successive carrier" under Article 30(1) and Washington D.C. was not the "destination" with respect to UTA.

CONCLUSION

Petitioners have failed to set forth special and important reasons as to why their writ of certiorari should be granted. They have not demonstrated that the Court of Appeals decision, with respect to UTA, is in conflict with the decision of another federal court of appeals or state court of last resort. Further, they have not demonstrated that the Parties regarded the UTA flight as part of a single operation of undivided transportation or that the Court of Appeals erred in holding that UTA was not subject to jurisdiction in Washington D.C. pursuant to Article 28(1) of the Warsaw Convention.

Accordingly, it is respectfully requested that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

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